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IN THE

Supreme Court of the United States

October Term, 1970

No. 462

THE BARR RUBBER PRODUCTS COMPANY,

Petitioner,

v.

THE SUN RUBBER COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This litigation was commenced on November 3, 1960, almost ten years ago, by petitioner ("Barr") against respondent ("Sun") as a suit for a declaratory judgment of invalidity and noninfringement of United States patent No. 2,629,134 (the "Molitor" or "'134" patent).

The patent *was* commercially, technically and judicially one of substance. The application for the patent was filed June 27, 1950 and it issued as the '134 patent on February 24, 1953. Its validity was adjudicated some twelve years ago in another action in the District Court in Ohio, *The Sun Rubber Company* v. *National Latex Products Company*, 159 F.Supp. 661 (N.D.Ohio, 1958), which adjudication was affirmed by the Court of Appeals for the Sixth Circuit, 274 F.2d 224 (C.A.6, 1958). A second petition for rehearing

was denied, 276 F.2d 167 (C.A. 6, 1960) and this Court thereafter denied a petition for certiorari therein, 362 U.S. 989 (1960).

The patent relates to a single temperature rotational casting process for use with a particular form of vinyl resin, a plastisol, and the Court of Appeals in the instant case noted (A 2, 3):

> "Concededly there are numerous advantages of a single temperature process over the other methods employed in the industry for molding articles of plastisol * * * the process set forth in Sun's patent appears now to be the preferred means for producing plastisol products commercially. Since the issuance of the patent Sun has licensed it to about twenty producers in the United States who have paid approximately $1,000,000 in royalties."

The patent has now, however, expired. All licensees thereunder have been notified of its expiration and Sun no longer receives any royalties thereunder.

Although the instant action was commenced about ten years ago, the patent's validity has not yet been determined in this action, the Court of Appeals for the Second Circuit, after the date of the expiration of the patent, having remanded the case to the District Court for a reconsideration of "all the issues pertaining to the patent's validity" (A 9).

In the District Court the petitioner, Barr, asserted twelve separate statutory defenses against the patent in suit (in one of which were included nine separate defenses of prior use). Barr further asserted an additional twelve claims relating to misuse, unfair competition and antitrust. In all, Barr posed about thirty-four separate issues.

The District Court below held the patent infringed by petitioner (A 77, 80) but, contrary to the holding of the Circuit Court of Appeals in Ohio, invalid by reason of *two* defenses relied upon by Barr, obviousness and anticipation, in the light of substantially the same prior art that was

before the Ohio courts (A 55-62). The District Court rejected the remaining contentions of Barr. With respect to the numerous issues of antitrust, misuse, and unfair competition, the District Court held "all have proved to be baseless in fact or in law or both" (A 78) and that the "accusations [of unfair competitive practices] are so unsubstantial on their face—or so wholly devoid of evidentiary support—as to be frivolous" (A 80).

The issue to which this petition for certiorari is most pertinent arose because the District Court, *sua sponte*, also held the patent both invalid and unenforceable and awarded substantial attorneys' fees (A 26-31) on the basis of findings it made, as a result of an independent examination, without notice to the parties, of the record and briefs in the Ohio case tried ten years before (A 52-5), that respondent's witnesses committed perjury, not only in the instant case, but in the case tried in Ohio (A 65-6). Reliance upon such evidence outside the record was revealed for the first time after trial, when the District Court's opinion was filed.

The respondent herein then asserted in the Court of Appeals that (1) the District Court committed error when it resorted to and relied upon evidence outside the record in the instant case and did so without notice to respondent and without affording respondent any opportunity for examination of witnesses thereon, the adducing of evidence with respect thereto or argument thereon * and (2)

* The opinion of the Court of Appeals plainly indicates the material significance of depriving respondent of such opportunity. The District Court opinion in this respect relates primarily to testimony with respect to the date of invention. The date of invention was simply historical and not critical with respect to any prior art. The District Court's finding with respect to perjury however related to that date and once being apprised of the District Court's evaluation of certain evidence on the basis of its own independent excursion into the Ohio record, Sun produced documentary evidence, rejected by the District Court on rehearing, but judicially noticed by the Court of Appeals, (A 16 n. 14, 22) which the Court of Appeals characterized as "succinctly demolish[ing] the theory that Sun adjusted the date of invention." (A 15)

the District Court's findings of perjury in the instant case, *irrespective* of whether it was proper to take notice of the Ohio record as it did, were themselves *clearly erroneous* in substantial respects and were not supported by the required degree of proof.

The Court of Appeals (Waterman, *C.J.*, Friendly, *C.J.*, and Kaufman, *C.J.*), unanimously held:

> 1. The District Court rested its determination of *invalidity* in part upon the finding of perjury and such finding influenced the Court's disposition of the questions of obviousness and anticipation (A 8).
>
> 2. A finding of perjury and award of attorneys' fees based thereon should be supported by "clear and convincing proof" and that the District Court did not, in making such adjudication, apply this standard of proof (A 9, 11). However, irrespective of the failure of the Court to apply this standard of proof, the evidence did not suffice to prove the commission of perjury even if a mere "preponderance of the evidence standard" was applied (A 11).
>
> 3. That the District Court relied (A 11) upon a "multitude of scattered inferences unreasonably drawn from flimsy evidence" and although the Court of Appeals was mindful of the trial judge's opportunity to evaluate the credibility of witnesses, the District Court's finding of perjury was *clearly erroneous* (A.20).
>
> 4. The trial judge exceeded the bounds of judicial notice by extensive reliance upon the record in the earlier litigation without advising the parties thereof or giving respondent an effective opportunity to object, examine or rebut the matters noticed (A 20, 21).

The Court of Appeals accordingly reversed the judgment below, reversed the award of Attorneys' fees based thereon and remanded the case to the District Court for reconsideration of all the issues relating to patentability (A 9, 20).

Such reconsideration has not yet been had.

Respondent's Analysis of the "Questions Presented" By Petitioner

Petitioner's "Questions Presented" do not lend themselves to ready analysis since three are posed as "questions", two are posed as "questions begged by the Court of Appeals" and seven, according to petitioner, are "related questions begged by the appellate decision" to be reviewed if the petition is granted—presumably on the basis of the first three or perhaps five questions!

Basically, what is wrong with the three—or five—primary questions is that they are not in fact raised by the Court of Appeals' decision.

First Question

The first Question raised is whether the Court of Appeals was correct in requiring in this case a higher standard of proof in assessing a charge of perjury than a mere preponderance of the evidence, the standard generally obtaining in a civil case.

The fact is that the Court of Appeals' decision reversing the District Court on the finding of perjury did not turn on the application by the Court of a higher standard of proof (A 9, sec. II to A 11, sec. III). The Court simply stated that it was "troubled" by the lower Court's failure to define the quantum of proof applied and assumed, from the lower Court's silence, that it applied the normal preponderance of the evidence test (A 9). The Court of Appeals then went on to state that there was ample authority to require a standard of clear and convincing proof to establish fraud in cases involving the recovery of moneys paid and the like (A 9-10). It relied upon a principle that when a person is charged with all the elements of a heinous crime, even in a civil case, he should be given the benefit of the usual presumption of innocence unless the adverse proofs are so far satisfactory as to be convincing (A 10)

and held in the instant case that logic and reason demanded that no lower standard of proof be applied in assessing a charge of perjury (A 10) particularly when that charge would result in the allowance of attorneys' fees not otherwise recoverable and that the Court below committed *procedural* error by applying the wrong standard of proof (A 11).

However, the Court then significantly held that irrespective of the failure to apply the proper standard of proof, the evidence in the Court below "did not suffice to prove the commission of perjury even if the 'preponderance of evidence' standard is applied as the test" (A 11) and that "the district court's finding of perjury was clearly erroneous" (A 20) even when measured by the lesser test.

Accordingly, the result did not turn on which, the greater or lesser, standard of proof was applied and petitioner's first Question is inaccurate and moot in view of the Court of Appeals' finding that the charge of perjury was unsupported in the record under either standard of proof (A 11).

Second Question

The second Question raised by petitioner is indeed a peculiar one and brings into question the validity of petitioner's representations to this Court. That Question as stated is whether the Court of Appeals was correct in remanding the case for reconsideration with respect to the issues of patentability simply because the District Court did not announce or define the standard of proof it applied in making its findings of perjury.

The discussion above under the first Question makes it quite plain that the Court of Appeals did not reverse the District Court and remand the patentability issues simply because the District Court failed to announce the standard of proof it applied (A 9). All the Court of

Appeals said was that it was "troubled" by, or was not aware of, which standard of proof was applied by the District Court and that it would assume that the lesser standard of proof, "preponderance of evidence", was applied. It then carefully analyzed the record below in detail and concluded that the District Court committed clear error irrespective of whether a "clear and convincing" standard or a "preponderance" test was applied (A 11).

Petitioner attempts to imply that the remand of all issues relating to patentability was unrelated to its reversal of the findings of perjury and hence was incorrect in that it failed to pass on the issue of validity.

The fact is that in measuring the invention of the patent against the prior art, the District Court disregarded the single critical feature in the process that made it successful and distinguished it from the prior art on grounds which the District Court stated was based on respondent's alleged inconsistent statements with respect to this subject in the case below and in the briefs, independently examined by the District Court, submitted by respondent in the early Ohio litigation. The District Court specifically utilized its evaluation of perjured and inconsistent testimony to apply the test of invention enunciated by this Court in *Graham* v. *John Deere*, 381 U.S. 1 (1966) on the question of lack of invention (A 54-5).

Further, the Court of Appeals, after its examination of the record specifically found that the District Court's finding of perjury *influenced* its determination of the questions of obviousness and anticipation. The Court of Appeals stated (A 8):

> "Although the district court purported to be resting its determination that Sun's patent was invalid on three independent bases, the conclusion is inescapable that the finding of perjury influenced the court's disposition of the other two questions, obviousness and anticipation."

Finally, the District Court below recognized that the decisions on patent validity of the District Court in Ohio and particularly that of the Court of Appeals for the Sixth Circuit would normally be entitled to great weight in assessing the validity of the patent in the instant case but then stated (A 65):

> "Perhaps the most significant point of all diminishing for this court the weight of the Sixth Circuit's decision is the overwhelming demonstration by the plaintiff here that the Sixth Circuit's record, like the one now under consideration, was blighted by perjury in significant respects."

The Court of Appeals rightly concluded therefore that central to a disposition of the issues in the case below was the ruling by the District Court on perjury (A 9).

Accordingly, it is plain that the Circuit Court did not remand the issues of patentability simply because, as petitioner suggests, the District Court committed a procedural error in failing to announce the standard of proof. It remanded the issues with respect to patentability because the determination of invalidity by the District Court was in fact based in a substantial part on its erroneous findings of perjury.

Third Question

The petitioner poses as his third Question, whether the District Court could exercise investigatorial powers by examining the factual record made and argumentative briefs submitted in another earlier action in aid of making findings of fact and conclusions of law in the case before it.

This Question assumes that the Court of Appeals reversed the decision below because of the examination of evidence outside the record in the case below, *per se*.

Respondent did raise this *per se* question in the Court of Appeals. However, the Court of Appeals simply said, with respect to this issue, that it questioned "the propriety

of the trial court's extensive reliance upon the record of the earlier Ohio litigation (A 20)." Further, without actually passing on the propriety of the examination of such evidence outside the record, *per se*, the Court then said that its questioning of the propriety of such reliance was that the District Court did so without advising or even hinting that the record and briefs in the other case would be evidentiary factors in determining the present case (A 20).

The Court of Appeals then pointed out that *notice* of reliance on the Ohio record was particularly critical in the instant case because the respondent was unaware of the specificity of any charge with respect to this issue, was unaware that the issue existed and was not afforded any opportunity to litigate the issue or contest the propriety of the taking of notice of the Ohio record.

In so holding, the Court of Appeals stated (A 20):

> "Moreover, we question the propriety of the trial court's extensive reliance upon the record of the earlier Ohio litigation without even hinting to the parties that the record would play such a large, if not a determinative, role in the present case. Cf. *Ohio Bell Tel. Co.* v. *Pub. Util. Comm'n*, 301 U.S. 292 (1937). In so doing, the trial judge exceeded the bounds of judicial notice and thereby denied Sun an effective opportunity to object, examine and rebut the matters noticed * * *."

The Court of Appeals in fact bottomed its reversal, not on whether the Court could *sua sponte* judicially notice the record and briefs in the Ohio case, but upon the fact that respondent had no fair notice thereof and no opportunity to meet the same (A 21).

Lending reality to the finding of the Court of Appeals was the fact that there existed in the Ohio record (portions not examined by the District Court) testimony and documents completely dispositive of the inferences independently drawn by the District Court below based on its

examination of the printed record only. As the Court of Appeals stated (A 22):

> "For example, if there had been adequate notice to Sun that the success of its litigation could conceivably turn on the issue of its perjury, crucial aspects of the Ohio proceedings such as the testimony of Chester Lile and the documents proving Sun's knowledge of a prior invention claim before November 30, 1956, evidentiary items apparently overlooked by the court below — would have undoubtedly been brought to the court's attention by Sun."

Again lending reality to this position, the fact is that the respondent on an application for reconsideration, when it was first apprised of the issue, called the attention of the District Court to the testimony of a Mr. Lile, which appeared in the *trial* transcript of the Ohio case, and which specifically corroborated the testimony in the instant case which the District Court erroneously found to be inconsistent with the testimony in the Ohio case. The District Court refused to consider it (A 17).

In addition, the respondent Sun proffered to the Court on such application for reconsideration documents of record in the Ohio case which were characterized by the Court of Appeals below as "succinctly demolish[ing] the theory" upon which the District Court relied for its finding of perjury (A 15). Despite the seriousness of the finding and despite the plain error which the documents demonstrated, the District Court refused to consider them.

On the same application for reconsideration, once the respondent was apprised of this issue, it proffered the *oral* testimony of three obviously unprejudiced witnesses (specifically outlined in affidavits of such witnesses), completely rebutting the bases upon which the perjury findings were made. The District Court similarly rejected such offer of proof (A 17).

Plainly, petitioner's third Question is purely hypothetical. The Court of Appeals did not reverse this District Court because it investigated the record and briefs in another case. It reversed it because it made that investigation of the printed record in the Court of Appeals (not the entire trial record) and the briefs on file in the appellate court and made dispositive findings thereon without ever giving respondent an opportunity to object thereto or to adduce rebuttal proof with respect thereto, in circumstances where, as the Court of Appeals reasonably demonstrates, such rebuttal proof could have been material (A 17, 22) in overcoming the findings made, in a sense *ex parte*, by the District Court.

Accordingly, petitioner's third Question is highly deceptive and not at all based upon the actual disposition of the issue by the Court of Appeals.

Fourth and Fifth Questions

The petitioner states with respect to these two Questions that they were "begged" by the Court of Appeals.

A good and sufficient reason for this characterization is one which should, under the ordinary principles of review, prevent their consideration on this petition, namely, the petitioner did not press or argue these Questions in the Court of Appeals. *Bass Ltd.* v. *State Tax Commissioner*, 266 U.S. 271, 285; *Heines* v. *Martin*, 268 U.S. 458, 465; *Walters* v. *City of St. Louis*, 374 U.S. 231, 233.

The fourth Question deals with the granting of a retroactive license by the Commissioner of Patents to file a foreign patent application corresponding to the application of the patent in suit. The petitioner adds some gloss to the basic Question by querying whether such a license may be granted *ex parte* after the patent is in litigation and by the additional query as to whether such retroactive license is prevented by intervening rights.

The Court of Appeals below specifically noted that this issue was stated in petitioner's Notice of Appeal but that it "is not pressed on appeal" (A 8, f.n.).

The same issue, however, was raised in a pretrial motion in the District Court herein by then District Judge Feinberg. Petitioner's motion was for summary judgment and there was no question of fact involved. Judge Feinberg denied the motion for summary judgment (A 104-6) 253 F. Supp. 12 (S.D.N.Y., 1966).

The same issue was again raised by petitioner upon the trial of the action below and the District Court held that petitioner "failed to show anything but 'inadvertence' to account for the solecism (a filing premature by nine days) of which it complains" (A 77).

There is no judicial dispute with respect to the right of the Commissioner of Patents to grant a retroactive license in the exercise of his discretion under the authority granted him by §§ 184 and 185 of Title 35, U.S.C. either with respect to the *ex parte* nature of the application, the fact that the patent is in litigation or the fact that the license is retroactive. The following cases have uniformly sustained such authority: *In re Lee and Heineman*, (C.D., 1948) 77 USPQ 659; *McCulloch Motors Corporation* v. *Oregon Saw Chain Corporation*, United States District Court for the Southern District of California, Central Division, Civil Action No. 919-57-PH; *Blake* v. *Bassick Company*, 146 USPQ 157 (N.D.Ill., 1963); *Engelhard Industries, Inc.* v. *Sel-Rex Corporation*, 143 USPQ 319 (D.C.N.Y., 1965); *Pillsbury Company* v. *Brenner*, 146 USPQ 99 (D.C.D.C., 1965); and *Minnesota Mining and Manufacturing Co.* v. *Norton Co.*, 366 F.2d 238 (C.A. 6, 1966).

The fifth Question posed by petitioner is in fact whether a patentee of a process may grant an exclusive license to use that process in a particular field and thereafter widely grant non-exclusive licenses to use the process in all other fields.

Respondent states that it has examined the petitioner's brief in the Court of Appeals and its reply brief and does not find this issue argued in that Court by the petitioner and again, such omission forces petitioner to state that the Court of Appeals "begged" the question.

The petitioner has embroidered the Question by adding thereto that the patentee has thereby eliminated competition in the product made by the exclusive licensee.

The exclusive license granted by respondent to a company called Wonder Products was exclusive only to use the process of the patent to manufacture hobby horses. The proof in the District Court established that competitive hobby horses could be and in fact were made by other processes and petitioner plainly failed to prove that there was any elimination of competition in the production of hobby horses. The District Court disposed of this issue by stating that it was answered by the rule of *General Talking Pictures Corp.* v. *Western Electric Co. et al.*, 304 U.S. 175 (1938). More significantly the District Court found that there was no elimination of competition and that petitioner's "claim of injury from this asserted violation is wholly unsupported by the record" (A 79, par. C). The Court of Appeals below referred to the District Court's holding that a variety of antitrust and unfair competition charges were "baseless in fact or in law or both" (A 24, sec. VII) and stated that it agreed with the District Court's conclusion in this respect.

The petitioner cannot lift itself by its own bootstraps in this Court by stating a hypothetical question which involves the antitrust laws but is totally unrelated to any proof or evidence in the action below. Its own abandonment of this issue in the Court of Appeals is a sufficiently practical indication of the lack of significance and substance in the Question attempted to be posed. Whether or not *General Talking Pictures* should be reviewed by this Court, we respectfully submit that the lack of factual support, as

found by the Courts below, for the petitioner's contention in the instant case makes it markedly inappropriate as an adequate medium to meaningfully review the doctrine of the *General Talking Pictures* case.

The three—or five—primary Questions posed by petitioner, yet not actually raised by the opinion of the Court of Appeals below, have been demonstrated ~~to be moot~~, hypothetical, abstract or not pressed in the Court of Appeals. This Court has long advised the bar of its power and duty with respect to such Questions. In *United States and Interstate Commerce Commission* v. *Alaska Steamship Company et al.*, 253 U.S. 113, 116 (1910) it said:

> "It is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it * * *. However convenient it might be to have decided the question * * * this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

The Remaining Seven Questions

The inclusion of seven additional questions, in footnote form, posed as "begged" by the Court of Appeals but "to be reviewed" if the petition is granted—presumably on other grounds—is in respondent's experience a unique, but highly questionable tactic, in a petition for review submitted to this Supreme Court. Respondent respectfully requests the Court's indulgence if its sense of caution constrains it to reply thereto.

These Questions in fact have been contrived by the petitioner as questions, whereas in fact they amount to no more than a restatement of a variety of allegations which the petitioner completely failed to prove in the District Court below, which the District Court specifically disposed

of, with respect to which the District Court made the finding that they "all have proved to be baseless in fact or in law or both" (A 78) and with respect to which the Court of Appeals either specifically passed upon or held that it agreed with the findings of the District Court with respect to the baselessness of petitioner's charges.

For example, Question 6 deals with petitioner's claim that the license payment by the B. F. Goodrich Company to respondent constituted a rebate with respect to purchases of resin from Goodrich by respondent rather than an actual royalty under the license (P. 4, 12, fn. 9).* Despite petitioner's assertion of this Question as a substantial one, the District Court specifically considered it and found that petitioner's contention, in the light of the evidence, was "scarcely intelligible", "difficult to follow and unmeritorious" (A 78).

Queston 7 is so contrived as to state a proposition which anyone would recognize as a violation of the antitrust laws (P. 4) if such facts existed. It relates to the contention made by petitioner at page 12 of its petition, note 7, regarding the sale of rotational casting machines by the McNeil Corporation and implies that such a condition existed with respect to McNeil's sales. Yet, the District Court in a firm finding found that "the *evidence* does not sustain, but serves to *refute* this charge" (A 79).

Question 8 (P 4) is a restatement of the basic contentions made by petitioner with respect to perjury and solidly rejected by the Court of Appeals.

Questions 9 and 10 deal specifically with matters clearly within the province of the *nisi prius* court. Petitioner sought, as the District Court and the Court of Appeals found, to expand this case, which had been pending for more than six years, on the eve of trial "further protracting an already unduly distended case" (A 23). Further, as the

* Petitioner's brief so indicated herein.

Court of Appeals noted, the petitioner had ample opportunity to, and did, pursue all of these Questions in the District Court without the joinder of the parties and without the allowance of additional pre-trial discovery and "the gist of their intended substance was *adequately* before the court" (A 28).

Although petitioner does not appear to rely upon these additional seven Questions as a primary basis for its petition for certiorari, its inclusion of these Questions in its petition, perhaps as "bait", is not only improper but as is shown herein, without merit.

ARGUMENT

Under the caption "Reasons for Granting the Writ", subheading A, Barr interposes certain comments, ostensibly applicable to all the questions subsequently raised, constituting a strong and unwarranted indictment of the actions and motivations of the Court of Appeals' handling of this case. Barr attacks the Court of Appeals decision as "Defying F.R.C.P. Rule 52(a)", "conflicting with and * * * undermin[ing] decisions of this court", "ignoring this court's * * * long standing policy", and "exhibit[ing] a grim determination to subvert the above principles [of this court]". Insofar as the comments under this heading might be considered, despite the clear mandate of Rule 40, subsection 5,* of this Court, they are totally irrelevant and immaterial to a disposition of the Question here sought to be presented.

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* Subsection 5 of Rule 40 states:

"Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court."

The only one of Barr's comments having any pertinence to the questions presented is the suggestion that the Court of Appeals substituted its judgment with respect to the findings of the District Court in contravention of Rule 52(a), F.R.C.P. It is clear, however, that the Court of Appeals was fully cognizant of Rule 52(a), F.R.C.P., from its statement (A 20):

> "In summary although we are definitely mindful that the trial judge is better able than we to evaluate the credibility of witnesses, we hold the District Court finding of perjury *clearly erroneous.*" (Emp. added).

By carefully reviewing the testimony and the principal documentary evidence on which the trial court had relied, the Appellate Court was clearly following the rule enunciated by this Court in *United States* v. *Gypsum Co.*, (1940) 333 U.S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

Thus, the Court of Appeals has specifically complied with the mandate of this Court in *Gypsum* by making a thorough and thoughtful review of the record in this case. In so doing the Appellate Court reached the conclusion that grave and clear error had been committed below and that the consequences which followed from this error were such that it was the proper judicial course to order a retrial of the issues consistent with its findings on the issue of perjury and fraud. It is apparent, therefore, that petitioner's ill founded and harsh condemnation of the Appellate Court wherein it characterized that Court's action in reviewing the record below as "exercises at later-day mind-reading" was unwarranted.

CONCLUSION

The Court of Appeals' action in reversing certain findings and conclusions of perjury which it found to be clearly unsupported by the evidence and in remanding this case to the District Court for a reconsideration of the issues of patent validity was clearly within its authority as a court of review and has presented this Court with no unusual questions of law.

This petition should be denied.

Respectfully submitted,

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Certificate of Service

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were airmailed postage prepaid to Albert L. Ely, Jr., Esq., 2404 Terminal Tower, Cleveland, Ohio and one (1) copy each to Harvey M. Brownrout, Esq., 70 Pine Street, New York, New York, and Theodore A. Lazar, Esq., 37 West Broad Street, Columbus, Ohio, attorneys and counsel for petitioner this 24th day of September, 1970.

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